

Ho (Migration) [2024] AATA 162 (2 February 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Cam Ho
VISA APPLICANTS:	Ms Thi Hong Thu Nguyen Master Minh Quang Pham Master Nha Uyen Pham
REPRESENTATIVE:	Mr Nick Koenig (MARN: 9251516)
CASE NUMBER:	2012176
DIBP REFERENCE(S):	BCC2019/2479186
MEMBER:	M. Edgoose
DATE:	2 February 2024
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Statement made on 02 February 2024 at 12:50pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – validly married – money transfers – limited evidence of shared household – no shared contact with the sponsor’s children – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221, 309.321; r 1.15

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 1 July 2020 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s 65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 10 May 2019 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 309.211(2) and cl 309.321.
4. The review applicant appeared before the Tribunal on 22 January 2024 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Thi Hong Thu Nguyen, the primary visa applicant, Mr Trong Canh Nguyen, a friend of the review applicant, and Mr Tom Pham, the son of “Miss Phuong” who owns the home where the review applicant lives. The Tribunal hearing was conducted with the assistance of an accredited interpreter in the Vietnamese and English languages.
5. The review applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

7. Clause 309.211(2) requires that, at the time the visa application was made, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. With limited exceptions that only apply in relation to a decision to grant or not grant a Subclass 309 visa made on or after 20 August 2022, the visa applicant must continue to be the spouse or de facto partner at the time of the Tribunal’s decision: cl 309.221. In the present case, the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
8. “Spouse” is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)–(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant’s and review applicant’s household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific

matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

9. If the parties are validly married, they may meet the requirements of a married relationship but not a de facto relationship. The couple married in Vietnam on 4 November 2018 and registered their marriage certificate on 20 November 2018. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

10. Financial aspects of the relationship

11. Regarding the financial aspects of the relationship, the review applicant and visa applicant informed the Tribunal that there is no joint ownership of assets; no joint liabilities; no pooling of financial resources; no legal obligations owed to the other party and limited sharing of day-to-day household expenses.
12. At hearing, the review applicant informed the Tribunal that his only savings is a CBA term deposit of AUD5,000 and that he is on the age pension through Centrelink given that he is 73 years of age. He further added that for the past 6 or 7 years he has rented a room in a house from a "Miss Phuong" for \$150 and according to his Centrelink documents he receives rental assistance. The visa applicant is 43 years of age and works as a kindergarten teacher for the Vietnamese Education Department and receives a salary, however no evidence of this salary or position was on the Tribunal file.
13. The Tribunal acknowledges that the review applicant has sent \$13,900 in money transfers to the visa applicant since 2017. According to the evidence, the last money transfer to the visa applicant was on 30 September 2023 for \$400. The review applicant claimed that the money transfers to the visa applicant were to support her financially and to pay for day-to-day living expenses. The visa applicant informed the Tribunal that any leftover money she is saving for the future, however no physical evidence of this was submitted to the Tribunal. The visa applicant did not submit any physical evidence to demonstrate how she uses the money to pay for day-to-day living expenses.
14. Overall, the Tribunal considers that very limited evidence regarding the financial aspects of the relationship has been provided. Given this, the Tribunal is not satisfied that the financial aspects of the relationship demonstrate that the couple are in a genuine relationship and have a mutual commitment to each other.

15. Nature of the household

16. The review applicant informed the Tribunal that as a couple they have had no children together. The review applicant is 73 years of age and has six adult children from his previous relationship. He further mentioned that his adult children are all married and have their own families, but he only sees them every now and then at parties. The visa applicant has two children aged 16 and 19 from her previous relationship and they are the secondary applicants in this matter. Therefore, there is no joint responsibility for care and support of children in this matter.
17. For the past 6 to 7 years, the review applicant has rented a room in a house from a "Miss Phuong" for \$150 and according to his Centrelink documents he receives rental assistance.

“Miss Phuong” lives at the property with her two adult children. The Tribunal found the review applicant to be evasive when asked about “Miss Phuong” and her two adult children.

18. Regarding the visa applicant’s current living arrangements, she owns her own home in Vietnam and lives there with her two children, the secondary applicants. The visa applicant has not provided any evidence in the form of a title that she owns the property in Vietnam and its value.
19. The review applicant claims that when he has visited the visa applicant in Vietnam, he has helped with the gardening and watering of plants and they did exercise together. The review applicant claimed at hearing that he had supplied all the evidence regarding the sharing of the responsibility of housework to his representative in the form of photographs. However, the Tribunal notes that there is no evidence on the Tribunal file to support this claim. The visa applicant claimed that when they have been together, they have shared the cooking, shopping, and the visiting of relatives. The last time the couple were together in person was in 2022 for a period of 22 days. Prior to this, the couple had not seen each other in person since 22 November 2018.
20. Overall, the couple has submitted very limited physical evidence prior to the hearing to support their oral evidence regarding the nature of the household. For these reasons, the Tribunal places minimal weight on the nature of the household due to the lack of supporting evidence.

21. Social aspects of the relationship

22. The review applicant claims that he represents himself to other people as being married to the visa applicant given that his marriage was registered in Vietnam and that he has a marriage certificate. He further added that his two brothers in Vietnam witnessed and attended the wedding. The visa applicant informed the Tribunal that the main way that she represents herself to other people as being married to the review applicant is when they have been together in Vietnam, they hang out together so that everyone can see that they are in a relationship. Given the limited time the couple have spent together, the Tribunal places minimal weight on this claim by the visa applicant. Since getting married on 4 November 2018 and registering their marriage on 20 November 2018, the couple have spent a maximum of 22 together in person.
23. Regarding the opinion of friends and acquaintances about the nature of the relationship, the review applicant informed the Tribunal that not one of his six adult children or family attended the wedding. In addition to this, no letters, statements or statutory declarations were provided in support of this relationship from the review applicant’s adult children or their families. The review applicant claimed at hearing that his friends and acquaintances are supportive of his second wife and to support this claim two witness provided oral evidence.
24. Mr Tom Pham, the son of “Miss Phuong” who owns the home where the review applicant lives, appeared as a witness and provided oral evidence in support of the relationship. Mr Pham has never met the visa applicant in person but has said hello when the review applicant has been speaking to the visa applicant on FaceTime. He stated that he knows the review applicant has gone to Vietnam to visit the visa applicant and he has seen photographs of the wedding. He informed the Tribunal that the review applicant has rented a room at the home owned by his mother for the past 6 or 7 years and he has recently been assisting him to find a rental if the visa applicant is successful in coming to Australia. Mr Pham informed the Tribunal that he doesn’t know much about the review applicant’s six adult children but does see one of the daughters at big family functions. Given that the witness has only spoken with the visa applicant on occasions when the review applicant has been on

FaceTime and has never met the visa applicant in person, the Tribunal places little weight on his oral evidence.

25. The second witness, Mr Trong Canh Nguyen, a friend of the review applicant, told the Tribunal that he has come to the hearing today to support the review applicant and hopes that the parties in this matter can be reunited. He further stated that he owns a bottle shop and has offered the visa applicant employment, as per the letter on the Tribunal file, if she is successful. The Tribunal notes that Mr Nguyen was with the review applicant in Vietnam at the coffee shop where the review applicant and visa applicant met for the first time on 17 September 2017. Although supportive of his friend, the review applicant, the Tribunal found that Mr Nguyen was not able to provide any further detail regarding the relationship. For these reasons, the Tribunal places minimal weight on his oral evidence.
26. The Tribunal notes that several email letters of support were submitted to the Tribunal that had initially been written in Vietnamese and translated through an online translator. The Tribunal was not supplied with the initial emails in the Vietnamese language, only the ones that have been translated through an online translations program. As a result of this, the Tribunal found that the English translated submissions made little sense. Therefore, the Tribunal has placed limited weight on these submissions.
27. Given the limited time the couple have spent together in person, there is limited evidence of them planning and undertaking joint social activities. In 2022 the couple spent a maximum of 22 days together in person where they claim they cooked together, watched Vietnamese television shows, visited family and relatives, visited several tourist attractions, went shopping and purchased clothes. The Tribunal notes that several photographs were submitted to the Tribunal on 3 February 2023 of the couple together and with third parties in Vietnam.
28. Given the limited time the couple have spent together in person and the overall lack of supporting evidence regarding the relationship, especially from the review applicant's adult children and their families, the Tribunal places limited weight on the social aspects of the relationship.

29. Nature of persons' commitment to each other

30. The couple claim to have first met on 17 September 2017 at a coffee shop in Vietnam. Based on the evidence, this was not an organised meeting. The couple exchanged phone numbers and started communicating with each other while the review applicant was in Vietnam. They claim to have met up in person a few times and their relationship developed. The review applicant returned to Australia on 13 October 2017 and the couple remained in contact through telephone calls and text messages. It is claimed that on 1 September 2018 the review applicant over the telephone proposed to the visa applicant. On 25 October 2018 the review applicant travelled to Vietnam and an engagement party was held on 27 October 2018. Several weeks later while the review applicant was in Vietnam, a wedding party was held on 4 November 2018 and the couple received their marriage certificate on 20 November 2018. Two days later the review applicant arrived back in Australia on 22 November 2018. Between 22 November 2018 and 26 October 2022, approximately 4 years, the couple did not see each other in person.
31. The Tribunal notes that the international borders were closed from March 2020 until late 2021. During this time the couple claim to have communicated via telephone and FaceTime as per the communication logs submitted. The concern for the Tribunal is that, overall, the couple spent a very limited time together in person. At the time of their first meeting, they did not see each other again in person until late 2018. Following the marriage in late 2018, the review applicant did not see the visa applicant in person until 26 October 2022 and only

stayed with her for a period of 22 days. Overall, the couple have possibly spent a maximum of 50 days living together in person since 25 October 2018. Given the lack of time the couple have spent together in person, the quickness in which this relationship developed and the limited supporting evidence, the Tribunal places little weight on the nature of the persons' commitment to each other.

32. The couple both stated that they see this relationship as a long-term one and that they draw companionship and emotional support from each other through communicating on a regular basis. The visa applicant claims that she would like for her children, the secondary applicants, to reunite with the review applicant in Australia and that this is not a fake relationship.
33. Having considered the oral evidence provided at hearing and overall, along with the lack of physical evidence, the Tribunal places limited weight on the overall nature of the persons' commitment to each other.

34. Any other circumstances of the relationship

35. The Tribunal has also considered that the visa applicant's ex-husband is in Australia and does not live far from the review applicant. She claims that she does not know the whereabouts of her ex-husband, the father of the secondary visa applicants, and that he does business far away.
36. The Tribunal asked the review applicant if he knows the visa applicant's ex-husband. He informed the Tribunal that when he lived in Vietnam before coming to Australia, he and the visa applicant's ex-husband lived in the same village. The review applicant claimed that he had not seen the visa applicant's ex-husband in Australia and that he was not aware that he lived nearby.
37. Based on the evidence, the Tribunal is satisfied the parties are married to each other under a marriage that is valid for the purposes of the Act. However, based on the oral evidence at hearing and the limited supporting physical evidence, the Tribunal is not satisfied the parties have a mutual commitment to a shared life as a married couple to the exclusion of all others, and that the relationship between them is genuine and continuing and that they do not live separately and apart on a permanent basis.
38. On the basis of the above, the Tribunal is not satisfied that the requirements of s 5F(2) are met at the time the visa application was made and the time of this decision.
39. Therefore, the visa applicant does not meet cl 309.211 and cl 309.221.
40. Given the above findings, the secondary applicants in this matter do not meet the requirements of cl 309.321.
41. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

42. The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

43. M. Edgoose
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).